



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: AUGUST 03, 2022

IN THE MATTER OF:

Appeal Board No. 621626

PRESENT: RANDALL T. DOUGLAS, MEMBER

In Appeal Board Nos. 621620 and 621621, the claimant appeals from the decisions of the Administrative Law Judge, filed February 2, 2022, insofar as they sustained the initial determinations holding the claimant ineligible to receive benefits, effective December 14, 2020 through January 31, 2021, on the basis that the claimant was not available for employment and/or not totally unemployed, as modified to be effective December 28, 29 and 30, 2020; and sustained the initial determination charging the claimant with an overpayment of \$2,484 in benefits recoverable pursuant to Labor Law § 597 (4), and \$900 in

Federal Pandemic Unemployment Compensation recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020. The Appeal Board, on its own motion pursuant to Labor Law § 620 (3),

reopened the Judge's decision in 122-00230 to reconsider the issue of lack of total unemployment for the period of December 14, 2020 through January 31, 2021.

In Appeal Board Nos. 621622, 621623 and 621624, the claimant appeals from the decisions of the Administrative Law Judge, filed February 2, 2022, insofar as they sustained the initial determinations holding the claimant ineligible to receive benefits, effective February 1, 2021 through March 21, 2021, on the basis that the claimant was not capable of work, as modified to be effective February 11, 2021 through February 19, 2021 and March 3, 2021 through March 21, 2021; sustained the initial determination charging the claimant with an overpayment of \$1863 in benefits recoverable pursuant to Labor Law § 597 (4)

and \$1,500 in Federal

Pandemic Unemployment Compensation recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, as modified to a recoverable overpayment of \$1,449 in regular unemployment insurance benefits and \$1,200 in FPUC benefits, and sustained the initial determination reducing the claimant's right to receive future benefits by 18 effective days and charging a civil penalty of \$504.45 on the basis that the claimant made willful misrepresentations to obtain benefits, as modified to impose the forfeit penalty of 18 effective days and a civil penalty of \$397.35.

In Appeal Board Nos. 621625 and 621626, the claimant appeals from the decisions of the Administrative Law Judge, filed February 2, 2022, insofar as they sustained the initial determinations disqualifying the claimant from receiving benefits, effective April 5, 2021, on the basis that the claimant voluntarily separated from employment without good cause, and sustained the initial determination charging the claimant with an overpayment of \$5,589 in benefits recoverable pursuant to Labor Law § 597 (4) and \$4,500 in Federal

Pandemic Unemployment Compensation recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, as modified to a recoverable overpayment of \$0 in regular unemployment insurance benefits and \$4,500 in FPUC benefits.

At the combined telephone conference hearing before the Administrative Law Judge all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances on by the claimant and on behalf of the employer.

In Appeal Board Nos. 621622, 621623 and 621624, we have reviewed the entire record and have considered the testimony and other evidence. It appears that no errors of fact or law have been made. The findings of fact and the opinion of the Administrative Law Judge are fully supported by the record and, therefore, are adopted as the findings of fact and the opinion of the Board.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked as a part-time cleaner for the employer herein and worked five days per week for four hours a day. She worked five days or was paid her regular schedule either through holiday or sick pay for

weeks ending December 20 and 27, 2020, January 3, 10, 17, 24 and 31, 2021. She did not work on December 28, 29 and 30, 2020, but used accrued sick leave because she was spending time with her family. She filed an original claim for benefits on January 20, 2021 and reported that her employment ended due to lack of work. For the week ending January 24, she worked eight hours and was paid eight hours of holiday pay. For the week ending January 31, she worked sixteen hours and was paid four hours of holiday pay. The claimant collected \$2,484 in regular benefits and \$900 in FPUC benefits during the period in issue.

OPINION: The credible evidence establishes that for the weeks ending December 20, 27, 2020, January 3, 10, and 17, 2021, the claimant worked or was paid for five days per week. The evidence further establishes that the claimant was not available for work on December 28, 29 and 30, 2020 because she was spending time with her family.

With respect to the period beginning January 18, 2021, new rules were in effect to determine total unemployment. 12 NYCRR § 470.2(h), "Day of Total

Unemployment," effective January 18, 2021, provides:

1. For the purpose of calculating the number of effective days in a week to determine a claimant's weekly benefit entitlement in accordance with Labor Law § 590, a claimant shall experience a "day of total unemployment" or "full day

of total unemployment" on each day that is not a day of employment.

2. The total number of "day(s) of employment" in a week shall be calculated by adding the total number of hours worked in a week of employment, provided however that no hours in excess of ten are included per calendar day, dividing the total number of hours by ten, and rounding up to the nearest whole number. If the total number of hours worked in a week is equal to or less than four hours, no day of employment will have occurred. For example, a claimant who works a total of 3 hours in a week shall be deemed to have engaged in zero days of employment, a claimant who works a total of 8 hours in a week shall be deemed to have engaged in one day of employment, and a claimant who works a total of 13 hours in a week shall be deemed to have engaged in two days of employment, except that if the 13 hours occurred on one calendar day, such claimant shall be deemed to have engaged in one day of employment.

Under the new rules, the evidence establishes that the claimant worked two days for weeks ending January 24 and 31, 2021. Accordingly, we conclude that the claimant lacked total unemployment during the period of December 14, 2020 through January 31, 2021, except for December 28, 29 and 30, 2020, where she was not available for employment. As the claimant was ineligible to receive benefits because she was not totally unemployed and/or not available for the period at issue, she was overpaid \$2,484 in regular benefits and \$900 in FPUC benefits. The benefits are recoverable because the claimant made a factually false statement on January 20, 2021 that her employment ended due to lack of work, when in fact, she continued to be employed.

In Appeal Board Nos. 621625 and 621626, our review of the record reveals that the cases should be remanded to hold a hearing insofar as they sustained the initial determinations of voluntary separation from employment without good cause and recoverable overpayment of FPUC benefits. The Judge considered the issue of whether the claimant took steps to preserve her employment without informing the parties that he was going to add this issue and without offering the parties an adjournment. Additionally, we find that there is good cause to consider the claimant's contention that she quit because she was working in close proximity with others on the same floor during the COVID-19 pandemic. The parties are placed on notice that the Judge shall take testimony and evidence regarding the claimant's physical work location and the proximity of her co-workers which shall be considered in rendering a decision. To this end, the claimant and the employer, and any additional firsthand witnesses, shall be questioned about the claimant's concerns or complaints. The Judge shall question the claimant about why she believed that her physical work location caused her to leave her employment. The Judge shall further take any additional relevant testimony or evidence as the Judge may find necessary.

**DECISION:** In Appeal Board Nos. 621620 and 621621, the decisions of the Administrative Law Judge, are modified as follows, and as so modified, are affirmed.

The initial determination, holding the claimant ineligible to receive benefits, effective December 14, 2020 through January 31, 2021, on the basis that the claimant was not available for employment and/or not totally unemployed; and charging the claimant with an overpayment of \$2,484 in benefits recoverable pursuant to Labor Law § 597 (4), and \$900 in Federal

Pandemic Unemployment Compensation recoverable pursuant to Section 2104 (f)(2)

of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, are sustained.

In Appeal Board Nos. 621622, 621623 and 621624, the decisions of the Administrative Law Judge are affirmed.

The initial determination, holding the claimant ineligible to receive benefits, effective February 1, 2021 through March 21, 2021, on the basis that the claimant was not capable of work, are modified to be effective February 11, 2021 through February 19, 2021 and March 3, 2021 through March 21, 2021; and as modified, is sustained. The initial determination charging the claimant with an overpayment of \$1,863 in benefits recoverable pursuant to Labor Law § 597 (4) and \$1,500 in Federal Pandemic Unemployment Compensation

recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, is modified to reflect a recoverable overpayment of \$1,449 in regular unemployment insurance benefits and \$1,200 in FPUC benefits, and as so modified, is sustained. The initial determination reducing the claimant's right to receive future benefits by 18 effective days and charging a civil penalty of \$504.45 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified to impose the forfeit penalty of 18 effective days and a civil penalty of \$397.35, and, as so modified, is sustained.

In Appeal Board Nos. 621625 and 621626, the decision of the Administrative Law Judge, insofar as they sustained the initial determinations disqualifying the claimant from receiving benefits, effective April 5, 2021, on the basis that the claimant voluntarily separated from employment without good cause, and sustained the initial determination charging the claimant with an overpayment of \$5,589 in benefits recoverable pursuant to Labor Law § 597 (4) and \$4,500

in Federal Pandemic Unemployment Compensation recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, as modified to a recoverable overpayment of \$0 in regular unemployment insurance benefits and \$4,500 in FPUC benefits, are rescinded.

Now, based on all of the foregoing, it is

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues of voluntary separation from

employment without good cause and recoverable overpayment, only, upon due notice to all parties and their representatives; and it is further

ORDERED, that the Notice of Hearing shall identify as the Purpose of Hearing the remanded issues of voluntary separation from employment without good cause and recoverable overpayment, only; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and so that at the end of the hearing all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the remanded issues only, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

RANDALL T. DOUGLAS, MEMBER